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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

MISC. No. 79-5995

VERNON SMITH and BILLY KIMMEL,

Petitioners.

v.

DONALD E. BORDENKIRCHER,

Respondent.

ON WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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January 25, 1980

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MISC. No. ____

VERNON SMITH and BILLY KIMMEL,

Petitioners.

v.

DONALD E. BORDENKIRCHER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

The petitioners, Vernon Smith and Billy Kimmel, pray that a writ of certiorari issue to review the order of the United States Court of Appeals for the Sixth Circuit on October 30, 1979.

OPINION BELOW

The order of the United States Court of Appeals for the Sixth Circuit was rendered on October 30, 1979, and is unreported. A timely petition for rehearing was overruled on November 30, 1979. Copies of both orders are attached hereto.

JURISDICTION

The order of the United States Court of Appeals for the Sixth Circuit was rendered on October 30, 1979. A timely petition for rehearing was overruled on November 30, 1979. This petition for a writ of certiorari was filed within ninety (90) days of that date. The jurisdiction of this Court is invoked pursuant to 28 USC § 1254(1).

QUESTION PRESENTED

Whether a defense attorney can continue to represent codefendants where he is obligated to cross-examine a former client (now a prosecution witness), especially where the attorney-client relationship had arisen from the codefendant's case.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved in this petition are the Sixth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

a - procedural history

On May 21, 1974, petitioners were jointly indicted with Shirley Smith in the Muhlenberg Circuit Court for the murder of Rusaw Gray in violation of KRS 435.010 (Transcript of Record, hereinafter designated as T.R., p. 67). On November 16, 1974, the indictment against Shirley Smith was dismissed (T.R., p. 140). Contrary to their plea, petitioners on December 5, 1974, were convicted by the jury (T.R., pp. 183-185; Transcript of Evidence, hereinafter designated as T.E., pp. 331-332). Petitioners on December 13, 1974, filed a Motion for New Trial (T.R., p. 186), and on December 14, 1974, filed a Motion for New Trial based upon newly discovered evidence (T.R., pp. 187-196). The Muhlenberg Circuit Court overruled the two Motions following an evidentiary hearing on January 21, 1975 (T.R., pp. 290-292). On the same day, judgment was entered and petitioners were sentenced to the Kentucky State Penitentiary for life (T.R., pp. 290-292). Notice of Appeal was filed on January 22, 1975 (T.R., p. 295).

Petitioners filed a direct appeal to the Court of Appeals of Kentucky from their conviction. The conviction was affirmed by the Supreme Court of Kentucky (formerly Court of Appeals) in a Memorandum Opinion Per Curiam rendered on December 3, 1976.

The petitioners in June of 1977 filed in the United States District Court for the Western District of Kentucky a petition for writ of habeas corpus pursuant to 28 USC §2254, which was accompanied by an affidavit of poverty. In his petition, the petitioners alleged, inter alia: The petitioners were deprived of their right to effective assistance of counsel in view of their trial counsel's conflicting interest in representing petitioners' co-indictee, Shirley Smith.

Without holding an evidentiary hearing, the District Court on August 9, 1978, dismissed the petitioners' petition for a writ of habeas corpus. Addressing the petitioners' allegation that they were denied effective assistance of counsel due to their counsel's conflict of interest, the District Judge concluded that "the prior representation by counsel of this prosecution witness did not deprive petitioners of any defense and they were not thereby denied the effective assistance of counsel."

On August 21, 1978, the petitioners filed a motion requesting reconsideration of the previously entered judgment. This motion was denied on November 21, 1978.

On December 21, 1978, the petitioners filed an application for a certificate of probable cause and tendered a notice of appeal. That same day the petitioners filed a motion for leave to proceed on appeal in forma pauperis. On December 28, 1978, the District Court granted the petitioners the requested relief.

In an Order entered on October 30, 1979, the United States Court of Appeals for the Sixth Circuit affirmed the judgment of the District Court. In ruling on the petitioners' allegation concerning the conflict of interest on the part of

their trial counsel, the Sixth Circuit stated:

> We have held that a showing of prejudice is a prerequisite to relief where alleged conflicts of interest deprive defendants of their Sixth Amendment right to counsel. United States v. Steele, 576 F.2d 111, 112 (6th Cir. 1978). There has been no showing of actual prejudice in the case. Smith and Kimmel v. Bordenkircher, Master Slip Opinion, at p. 1.

A timely Petition for Rehearing and Suggestion For Rehearing En Banc was filed on November 5, 1979. However, this petition was denied in an Order entered on November 30, 1979.

b - the material facts

Petitioners' trial defense counsel was originally retained to represent petitioners and Shirley Smith (T.E., p. 9). As petitioners' counsel stated: "I stood up in Court with her when the plea was entered, and I represented her at a preliminary hearing" (T.E., p. 9).

On September 9, 1974, the Honorable A. G. Rhea moved the trial court for leave "to withdraw as counsel of record for Shirley Smith because of an apparent conflict of interest" (T.R., p. 95; App., p. 21). In an attached affidavit, Mr. Rhea explained "that he was retained in March of this year to represent all three defendants" (T.R., p. 96; App., p. 22). Trial defense counsel noted that he had previously had "several interviews with all of the defendants, including Shirley Smith alone" and that "he. . .had no reason to believe that there was a conflict of interest between [petitioners] on the one hand and Shirley Smith on the other" (T.R., p. 96; App. p. 22). Mr. Rhea then explained his newly-discovered predicament to the trial judge:

> On this date, September 9, 1974, he was advised by the Commonwealth Attorney of Muhlenberg County that Shirley Smith was going to give the Commonwealth a statement and that she had been assured that upon a plea of guilty she would receive no more than five years; that after being so advised by the Commonwealth Attorney of Muhlenberg County,

> the affiant went to the Muhlenberg County Jail and interviewed his client, Shirley Smith, and was for the first time advised that she did intend to make such a statement; that the statement she stated she would make conflicts with the previous statements given by her to the undersigned and conflicts with the interests of the other defendants, Vernon Smith and Billy Kimmel (emphasis added); (T.R., p. 96; App., p. 22).

On September 10, 1974, the court below ordered that petitioners' trial counsel be permitted to withdraw as attorney of record for Shirley Smith (T.R., p. 98).

Under these circumstances, it is submitted that petitioners were denied effective assistance of counsel because trial defense counsel was faced with conflicting interests in defending petitioners while having the obligation to cross-examine a former client, Shirley Smith.

REASONS FOR GRANTING THE WRIT

1. THE DECISION OF THE SIXTH CIRCUIT IS IN CONFLICT WITH DECISIONS OF THIS COURT AND OTHER FEDERAL CIRCUITS INSOFAR AS IT CONCLUDED THAT PREJUDICE MUST BE AFFIRMATIVELY DEMONSTRATED IN A CONFLICT OF INTEREST CASE.

In essence, the panel of the Sixth Circuit concluded that the conflict of interest in petitioners' case did not warrant reversal of the District Court because prejudice was not shown. Petitioners submit that this conclusion is in direct conflict with this Court's decision in Holloway v. Arkansas, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978).

Petitioners recognize that pre-Holloway decisions of the Sixth Circuit required that "[t]he defendant must suffer actual prejudice from the conflicting interests - the mere possibility of prejudice is not sufficient to overturn a conviction." United States v. LaRiche, 549 F.2d 1088, 1095 (6th Cir. 1977). However, the third portion of the opinion in Holloway v. Arkansas, supra, specifically addressed the issue of whether "Glasser [v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942)] requires reversal, even in the absence of a showing of specific prejudice to the complaining codefendant. . ." Id., 98 S.Ct. 1180. After reviewing the factual background and the legal analysis of Glasser, this Court in Holloway concluded that, where a conflict of interest is shown to exist, reversal is automatic:

> Moreover, this Court has concluded that the assistance of counsel is among those "constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." Chapman v. California, supra, 386 U.S. at 23, 87 S.Ct. at 827. Accordingly, when a defendant is deprived of the presence and assistance of his attorney, either throughout the prosecution or during a critical stage in, at least, the prosecution of a capital offense, reversal is automatic. Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); Hamilton v. Alabama, 368 U.S. 52, 82 S.Ct. 157, 7 L.Ed.2d 114 (1961); White v. Maryland, 373 U.S. 59, 83 S.Ct. 1050, 10 L.Ed.2d 193 (1963). Id., 98 S.Ct. at 1181.

This decision by this Court was not without precedence in the federal system. It is well-recognized that the record of a trial may not reflect a conflict of interest even where one unquestionably exists. "It must be remembered that in cases involving conflicts of interest, the conflict does not always appear full-blown upon the record since counsel may throughout endeavor to reconcile the conflict." Austin v. Erickson, 477 F.2d 620, 626 (8th Cir. 1973). Accordingly, the obvious reason against insisting on a precise delineation of the prejudice suffered is that such a task is made very difficult when one must rely on a cold, printed record for reconstruction of the manifold and complex dynamics of the trial process, including reasons for trial tactics which may have been dictated by the joint representation. Like the famous tip of the iceberg, the record may not reveal the whole story. Lollar v. United States, 376 F.2d 243, 246 (D.C. Cir. 1967). Similarly, the Fifth Circuit Court in Castillo v. Estelle, 504 F.2d 1243 (5th Cir. 1974), noted:

> When there is a conflict of interest such as exists in this case, the prejudice may be subtle, even unconscious. It may elude detection on review. A reviewing court deals with a cold record, capable, perhaps, of exposing gross instances of incompetence but often giving no clue to the erosion of zeal which may ensue from divided loyalty. Accordingly, where the conflict is real as it is here, a denial of the right to effective representation exists, without a showing of specific prejudice. Id., at 1245.

Interestingly enough, the decision of the Sixth Circuit in the petitioner's case is seemingly in conflict with another panel of the Sixth Circuit:

In the most recent decision of Thacker v. Bordenkircher, 590 F.2d 640 (6th Cir. 1979), the Sixth Circuit recognized that prejudice no longer needed to be shown in a conflict of interest situation:

> More important, however, is the fact that the Supreme Court did not hold in Holloway that mere potential conflict is sufficient to require relief. Rather, the Court held that when an actual conflict exists, prejudice is presumed and reversal is automatic. Id. at 489, 98 S.Ct. 1173. Id., at 642.

Due to this inherent conflict, petitioners respectfully request this Court to grant this Petition.

2. THE DECISION OF THE SIXTH CIRCUIT IS IN CONFLICT WITH OTHER FEDERAL CIRCUITS AND WITH VARIOUS STATE COURTS IN REJECTING A CONFLICT OF INTEREST UNDER THE CIRCUMSTANCES ENCOUNTERED IN PETITIONERS' CASE.

In the petitioners' case, the record clearly reveals that privileged information obtained from Shirley Smith was relevant to her cross-examination. Such information, which fell under the attorney-client privilege, could create difficulties for the defense attorney in two different ways. Most obviously, there might be a temptation to use the information to impeach the client. However, the more difficult problem which may arise is the danger that counsel may overcompensate and fail to fully cross-examine for fear of misusing his confidential information. Defense counsel might thereby fail to inquire into legitimate areas of concern. In such an event, the cross-examination would devolve into a hollow shell of its potential.

However, as previously discussed, the Sixth Circuit rejected the conflict of interest claim in the petitioners' case. In so doing, the Court concluded that the petitioners could not have suffered any prejudice from the conflict of interest:

> No other attorney could have asked the co-indictee cross-examination questions derived from confidential statements that she had made to trial counsel; the attorney-client privilege would have prevented trial counsel from divulging such information to another attorney who acted in his place. We do not believe, therefore, that the defense of Smith and Kimmel was any less full or effective than it otherwise could have been but for the prior representation of the co-indictee by trial counsel. Smith and Kimmel v. Bordenkircher, Master Slip Opinion, at p. 2.

In United States v. Dolan, 570 F.2d 1177 (3rd Cir. 1978), the court examined a situation where the district judge ordered a defense attorney to withdraw from representing either of two codefendants. In the cited case, counsel had been retained to represent both Dolan and Garofolo on federal charges. Garafolo pleaded guilty and the prosecution planned to call him as a witness against Dolan. Id., at 1179. Even though Dolan waived any conflict,

the district judge ordered counsel to withdraw from representing either Garofolo or Dolan because he felt that defense counsel "having previously represented Garofolo, could not adequately cross-examine him after he testified for the Government." Id., at 1180, fn. 6. Describing this as "an actual serious conflict of interest," the Third Circuit concluded that Dolan could not waive his conflict of interest under the circumstances. Id., at 1184. In affirming the district court, the court explained:

> Accordingly, we hold that when a trial court finds an actual conflict of interest which impairs the ability of a criminal defendant's chosen counsel to conform with the ABA Code of Professional Responsibility, the court should not be required to tolerate an inadequate representation of a defendant. Such representation not only constitutes a breach of professional ethics and invites disrespect for the integrity of the court, but it is also detrimental to the independent interest of the trial judge to be free from future attacks over the adequacy of the waiver or the fairness of the proceedings in his own court and the subtle problems implicating the defendant's comprehension of the waiver. Id., at 1184.

The court in United States v. Vargas-Martinez, 569 F.2d 1102 (9th Cir. 1978), encountered a similar conflict of interest situation. In the district court, the judge had ordered substitution of the appellant's counsel, Robert Dorne, due to a conflict of interest arising out of Dorne's previous representation in state court of Juana Maldonado, a codefendant who had agreed to become a prosecution witness. Id., at 1104. In approving the trial judge's actions, the Ninth Circuit explained:

> [T]he dual representation created an inescapable conflict of interest which had not been waived by both codefendants . . . .Since Maldonado was a prosecution witness, the presence of Dorne as counsel presented the possibility of disclosure of confidential communications. Faced with a conflict of interest between two codefendants, the court was bound to effect a resolution. Id., at 1104; emphasis added).

In People v. Henry, 63 Ill.App.3d 571, 379 N.E.1340 (1978), the defendant contended that he was denied effective assistance of counsel from his appointed attorney's representation of a codefendant who pleaded guilty and became a prosecution witness. Describing this as "an actual conflict" Id., at 1343, the Illinois court reversed Henry's conviction. In so doing, the court cited with approval from a previous decision in People v. Drysdale, 51 Ill.App.3d 697, 366 N.E.2d 394, 397 (1977):

> Thus where the same attorney represents a defendant and a co-defendant whose interests are 'antagonistic' reversal is warranted. [Citations.] * * * In such a situation, even where the attorney's services to the co-defendant have been terminated but where the co-defendant testifies against the defendant, there exists the potential of an inability to effectively cross-examine the co-defendant due to the continuing commitment of the attorney not to disclose any confidence given him by his former client.

See also: People v. Halluin, 36 Ill.App.3d 556, 344 N.E.2d 579 (1976); Taylor v. United States, 226 F.337 (D.C. Cir. 1955); United States ex rel Platts v. Myers, 253 F.Supp. 23 (E.D.Pa. 1966); and Baker v. Wainwright, 422 F.2d 145 (5th Cir. 1970).

In the case at bar, trial defense counsel was confronted with the responsibility of defending petitioners to the best of his ability while at the same time respecting the confidential nature of his attorney-client relationship with the prosecution witness, Shirley Smith. It is evident from Mr. Rhea's affidavit to the trial court that Shirley Smith's testimony at trial differed materially from prior statements she had made to him. However, due to the existence of the attorney-client relationship at the time of the prior inconsistent statement, defense counsel could not inquire into these matters during his cross-examination of Shirley Smith. Consequently, the limits on defense counsel's representation of petitioners which were imposed by his concomitant responsibility to Shirley Smith denied petitioners their rights to effective assistance of counsel. Contrary to the conclusion of the Sixth Circuit, an actual conflict of interest existed at the petitioners' trial.

Accordingly, petitioners request this Court to grant this Petition.

3. THE DECISION OF THE SIXTH CIRCUIT IS IN CONFLICT WITH DECISIONS OF THIS COURT AND OTHER FEDERAL CIRCUITS INSOFAR AS IT IGNORED THE OBLIGATION OF THE TRIAL JUDGE WHEN PRESENTED WITH A CONFLICT OF INTEREST.

The record in the petitioners' case clearly reveals that the trial judge was informed of the underlying facts for defense counsel's conflict of interest. All of the relevant material was presented to the trial court in defense counsel's motion and affidavit to withdraw as Shirley Smith's attorney. Even though the petitioners argued before the Sixth Circuit that this situation created a sua sponte obligation on the trial judge to investigate whether the conflict would preclude the possibility of effective assistance of counsel, the Sixth Circuit failed to address this point in their Order.

The Court of Appeals for the Second Circuit examined this point in United States v. Alberti, 470 F.2d 878 (2nd Cir. 1972), cert. denied 411 U.S. 919, 93 S.Ct. 1557, 36 L.Ed.2d 311 (1973):

> We should like to comment about the proper course of action for the trial judge to take when a potential conflict of interest with regard to counsel becomes apparent. With regard to the court's assignment of one attorney to represent several defendants, we have said, in Morgan v. United States, 396 F.2d 110, 114 (2d Cir. 1968), that:
>
> > Where the trial judge assigns the same attorney to represent two or more defendants, he should do so only after conducting the most careful inquiry, as to which a full record should be made, and after satisfying himself that no conflict of interest is likely to result and that the parties involved have no valid objection.
>
> Similar considerations are involved when the court becomes aware of a potential conflict of interest with regard to a defendant's retained counsel, especially when the person with the potentially competing interest is known to be a government witness. In such circumstances, the district judge should conduct a hearing to determine whether there exists a conflict of interest with regard to defendant's counsel such that the defendant will be prevented from receiving advice and assistance sufficient to afford him the quality of representation guaranteed by the sixth amendment. In addition, the trial judge should see that the defendant is fully advised of the facts underlying the potential conflict and is given an opportunity to express his or her views. Id., at 881-882.

This obligation or duty on the part of a trial judge has reached new importance in view of this Court's decision in Holloway v. Arkansas, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978). In the cited case, defense counsel on several occasions brought to the attention of the trial judge the conflict of interest in his joint representation of the codefendants. Id., 98 S.Ct. at 1175-1176. This Court, in evaluating the role of the trial court in this type of situation, stated:

> The judge then failed either to appoint separate counsel or to take adequate steps to ascertain whether the risk was too remote to warrant separate counsel. We hold that the failure in the face of the representations made by counsel weeks before trial and again before the jury was empanelled, deprived petitioners of the guarantee of "assistance of counsel." Id., 85 S.Ct. at 1178-1179; (emphasis added).

In view of the trial judge's knowledge of defense counsel's opinion that a conflict of interests existed, he had an affirmative duty to ascertain if petitioners' were aware of the potential for conflicts of interest that existed in the case sub judice. Furthermore, the trial judge was required to inquire whether defense counsel could still provide the quality of legal assistance guaranteed to petitioners by the Sixth Amendment. It is unquestionable that the trial court had an affirmative obligation to protect the rights of petitioners to have the effective assistance of counsel. The failure of the trial court to do so denied petitioners their constitutionally protected rights.

Consequently, petitioner respectfully requests this Court to grant this Petition.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the order of the United States Court of Appeals for the Sixth Circuit rendered on October 30, 1979.

Respectfully submitted,

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No. 79-3067

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

FILED

OCT 30 1979

JOHN P. HEHMAN, Clerk

VERNON SMITH and
BILLY KIMMEL,

Petitioners-Appellants

v.

DONALD E. BORDENKIRCHER,
Superintendent, Kentucky
State Penitentary,

Respondent-Appellee

O R D E R

Before: CELEBREZZE, MERRITT and KENNEDY, Circuit Judges.

Smith and Kimmel appeal the dismissal of their joint petition for a writ of habeas corpus. In seeking habeas corpus relief, they argue that they did not enjoy the full and effective assistance of counsel at their 1974 murder trial. The attorney who defended them also had represented a co-indictee who pled guilty pursuant to a plea bargain. Smith and Kimmel argue that, because of this prior representation, the trial counsel was unable to cross-examine the co-indictee on the basis of damaging information protected by the attorney-client privilege. The District Court dismissed the petition on the merits.

We have held that a showing of prejudice is a prerequisite to relief where alleged conflicts of interest deprive defendants of their Sixth Amendment right to counsel. United States v. Steele, 576 F.2d 111, 112 (6th Cir. 1978). There has been no showing of actual prejudice in the case.

Nor could there be. No other attorney could have asked the co-indictee cross-examination questions derived from confidential statements that she had made to trial counsel; the attorney-client privilege would have prevented trial counsel from divulging such information to another attorney who acted in his place. We do not believe, therefore, that the defense of Smith and Kimmel was any less full or effective than it otherwise could have been but for the prior representation of the co-indictee by trial counsel.

We find no merit in the arguments advanced by Smith and Kimmel pertaining to the admission of a former mental patient's testimony and the trial court's failure to instruct the jury to determine the exact cause of death. Nor do we believe that the District Court relied to an improper extent on the state appellate court opinion in reaching a decision.

Accordingly, we affirm the dismissal of the joint petition by the District Court.

ENTERED BY ORDER OF THE COURT
John P. Hehman, Clerk

By Grace Keller
Deputy Clerk

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

FILED
NOV 30 1979
JOHN P. HEHMAN, Clerk

VERNON SMITH and BILLY KIMMEL, Petitioners-Appellants v. DONALD E. BORDENKIRCHER, Superintendent, Kentucky State Penitentiary, Respondent-Appellee	ORDER DENYING PETITION FOR REHEARING

Before: CELEBREZZE, MERRITT and KENNEDY, Circuit Judges.

No judge of the court having moved for rehearing en banc, the petition for rehearing has been referred to the hearing panel for disposition.

Upon consideration, it is ORDERED that the petition for rehearing be and hereby is denied.

ENTERED BY ORDER OF THE COURT

John P. Hehman
Clerk